83-1088

NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

AUBREY NICHOLS, PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Aubrey Nichols, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered in the above entitled case on June 15, 1983.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER WAS ENTITLED TO ACQUITTAL AFTER HIS FIRST TRIAL BECAUSE A REVIEWING COURT FOUND INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF THE CRIME CHARGED AND RETRIAL WAS THEREFORE IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT?

II. WHETHER THE KENTUCKY TRIAL AND APPELLATE COURTS ERRED IN REFUSING TO DIRECT A VERDICT OF ACQUITTAL AT PETITIONER'S FIRST TRIAL BECAUSE OF THE INSUFFICIENCY OF THE EVIDENCE IN DIRECT CONFLICT WITH THE CONSTITUTIONAL STANDARD ENUNCIATED IN A DECISION OF THIS COURT?

III. WHETHER THE SECOND TRIAL OF THE PETITIONER WAS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FEDERAL CONSTITUTION AND IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT?

IV. WHETHER A CRIMINAL DEFENDANT WHOSE FIRST TRIAL ENDED IN A HUNG JURY HAS THE RIGHT TO IMMEDIATELY APPEAL FROM THE DENIAL OF HIS MOTION TO BAR RETRIAL ON THE GROUND OF FORMER JEOPARDY, WHEN HE ALLEGES THAT THE EVIDENCE AT TRIAL WAS LEGALLY INSUFFICIENT TO HAVE SUSTAINED HIS CONVICTION AND HE CANNOT, THEREFORE, BE FORCED TO RUN THE GAUNTLET OF A SECOND PROSECUTION?

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The following opinions are represented in Appendix A hereto:

From the Supreme Court of Kentucky, the opinion of June 15, 1983, which is not yet reported; the Order denying Petition for Rehearing of November 2, 1983; the Order Granting Stay of Execution of November 18, 1983.

The opinion of the intermediate Court of Appeals of Kentucky of April 2, 1983 which is unreported.

The Judgment of the Perry Circuit Court of March 21, 1981.

JURISDICTION

The opinion of the Supreme Court of Kentucky (Appendix, page 1a) was entered on June 15, 1983, affirming Petitioner's conviction.

A timely Petition for Rehearing was denied on November 2, 1983 (Appendix, page 10a) and the jurisdiction of the Supreme Court of the United States is now invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the constitutional and statutory provisions involved in this petition and reprinted in pertinent part in Appendix B hereto:

U.S. Const. amend. V

U.S. Const. amend. XIV

Ky. Rev. Stat. Ann. §507.020 (Bobbs-Merrill Supp. 1982): Murder

Ky. Rev. Stat. Ann. §507.040 (Bobbs-Merrill 1975): Manslaughter in the second degree.

Ky. Rev. Stat. Ann. §507.020(3) (Bobbs-Merrill 1975): Definition of mental states.

STATEMENT OF THE CASE

This case was tried twice, first in November, 1979 and again in October, 1980. It arose out of an incident which occurred on the evening of November 30, 1978 and which resulted in the death of Petitioner's friend, Mrs. Phyllis Madden, who was getting into his automobile while he held the door. The Petitioner maintained that her death was accidental, the result of Mrs. Madden's having suddenly fired a gun at him and his subsequent struggle to get the weapon away from her. The Commonwealth contended that after Mrs. Madden had shot at Petitioner, he retrieved the weapon and fired it into the auto deliberately. The first trial ended in a hung jury and a mistrial was declared. At the second trial, the jury found the Petitioner guilty of Second Degree Manslaughter and a Judgment was entered sentencing him to ten (10) years in the penitentiary.

At the first trial, characterized by scant and unreliable evidence, the Petitioner unsuccessfully moved for a directed verdict of acquittal at the end of the Commonwealth's case (TR 69-70)[1] and at the conclusion of all the evidence (TR 108-09). The case went to the jury on an instruction for murder only (RA 92-103) and a deadlocked jury resulted (RA 104-105).

The Petitioner contends that at the first trial the evidence was insufficient to support a conviction, and, therefore, he was entitled to a directed verdict of acquittal. Being so entitled, and the Kentucky Court of Appeals having so found impliedly (Pet. App. 15a), his second trial was barred by the Double Jeopardy Clause of the Constitution under this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978).

As a basis for his plea that the evidence at the first trial was insufficient, petitioner directs this Court's attention to the totality of the Commonwealth's case as presented (TR 13-69). The Commonwealth relied upon one supposed eyewitness who

[1]Proceedings stenographically reported and transcribed consist of three (3) volumes for these two (2) trials. The stenographically reported transcription of the first trial's proceedings will be referred to by TR, and the transcription of the second trial's proceedings will be referred to by the letters TR, v. I and TR, v. II. All proceedings which are not stenographically reported will be referred to as the Record on Appeal and noted by the letters RA. References to court opinions and Constitutional or statutory provisions which are included in the Appendices hereto will be noted with the letters Pet. App. All of the above abbreviations will be followed directly by the page numbers.

was far away, stated that he was not sure of what he saw, and admitted that most of the facts which he had presented to the Grand Jury were put together after he had re-visited the scene. After such confusing testimony, the Commonwealth presented three (3) law enforcement officers, who gave perfunctory testimony that the Petitioner had blood on him at the hospital at the time of his arrest (TR 45); that there was glass, but no bullet found inside the car (TR 48-51); that pictures were taken of the scene (but the Commonwealth did not produce them) (TR 50); that results of gunshot residue tests showed that the victim had fired a gun, but the Petitioner's tests were negative (TR 58). The fifth and last witness was inside a building adjoining the parking lot and could testify only to having seen the victim's sitting in the vehicle prior to the fatal shooting, a fact undisputed by either side (TR 62). Such was the case mustered by the Commonwealth to attempt to convict the petitioner of murder.

At the second trial, characterized by a much stronger case prepared by the Commonwealth, the Petitioner moved to dismiss the indictment or to enter a judgment notwithstanding the verdict because the second trial was barred by the Double Jeopardy Clause of the Federal and State Constitutions (RA 117-121; 129-130), but these motions were overruled (RA 131) and a Judgment entered sentencing Petitioner to ten (10) years hard labor (Pet. App. 19a).

On April 2, 1982, the Kentucky Court of Appeals affirmed the conviction obtained at the second trial as being based on sufficient evidence but characterized the case at the first trial as "very weak" (Pet App. 13a) and summarized that the evidence presented a "reasonable basis for a conviction under a *lesser included offense.*" (emphasis added) (Pet. App. 15a). On June 15, 1983, the Supreme Court of Kentucky also affirmed the conviction in a written Opinion not yet published (Pet. App. 1a), and a rehearing was denied by that Court on November 2, 1983 (Pet. App. 10a). Although asked repeatedly at oral argument to apply the standard of this Court in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), the Supreme Court of Kentucky refused to adopt *Jackson*, ignored the above quoted passage of the lower court, and concluded that a reasonable juror could have believed from the scant evidence that the petitioner was guilty of murder.

On November 18, 1983 Petitioner obtained an Order staying the execution of his sentence only "for a period of ninety (90) days to and including January 31, 1984" (Pet. App. 11a).

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAS ENTITLED TO ACQUITTAL AFTER THE FIRST TRIAL BECAUSE A REVIEWING COURT FOUND INSUFFICIENT EVIDENCE TO SUSTAIN CONVICTION OF THE CRIME CHARGED, AND SUBSEQUENT RETRIAL WAS THEREFORE IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

When Petitioner properly preserved the issue of the insufficiency of the evidence at his first trial and presented it as error to the Kentucky Court of Appeals after conviction at his second trial, the intermediate appellate Court in Kentucky impliedly found insufficient evidence for the one and only crime with which he was charged, murder.

The Kentucky Court of Appeals characterized the Commonwealth's case as "very weak" (Pet. App. 13a); referred to the Commonwealth's effort as "attempted" (*Id.*); found that the physical evidence "did tend to support Nichols's explanation." (*Id.* at 14a). Most importantly, the appellate Court stated:

> The trial court instructed only on the offense of murder. Although the evidence of murder was weak and questionable, there was nevertheless sufficient evidence to submit the case to the jury. Certainly we cannot say that there was not a reasonable basis for a conviction under a *lesser included offense. Id.* at 15a. (Emphasis added).

Petitioner submits that in so saying, the Court of Appeals implied that there was not a reasonable basis

for a conviction on the higher offense. Given the ambiguity and seeming patent contradiction in the two (2) sentences so juxtaposed, it seems clear that the sufficient evidence to submit to the jury, which they found, was of a lesser included offense and not of the offense charged. This interpretation seems proper, particularly when viewed with the preceding characterization of the case as weak and the appellate Court's final comment on the first trial that "prosecutors, defense attorneys and trial judges should be aware of . . . *Burks* v. *U.S.*, 437 U. S. 1 (1978)." *Id.* at 16a.

Petitioner submits that such a statement regarding the lesser included offense is an implicit finding of insufficient evidence on the higher charge which was submitted to the jury. In this respect, it is analogous to the decision of this Court in *Green* v. *The United States*, 355 U.S. 184 (1953). In *Green*, this Court found an "implicit acquittal" when the jury had no express finding as to first degree murder and found him guilty of second degree murder. After reversal, the State attempted to try him on both accounts again, but this Court held that the Double Jeopardy Clause forbade retrial on the higher count because of the jury's implicit acquittal. Similarly, petitioner maintains that holding the evidence sufficient for a lesser included offense is an implicit finding that it was insufficient for the higher included offense.

When Petitioner appealed to the Supreme Court of Kentucky to review the evidence and the implicit

admission of the Court of Appeals' Opinion, the Supreme Court of Kentucky chose to review the evidence and ignored this issue of the implicit finding of insufficiency.

Because the evidence at Petitioner's first trial was found by a reviewing Court to be insufficient, and thus his second trial was barred under the United States Constitution as explained in *Burks*, Petitioner prays that this Court review his case to find that his ultimate conviction was obtained in violation of the Double Jeopardy Clause.

II. THE KENTUCKY TRIAL AND APPELLATE COURTS ERRED IN EVALUATING THE SUFFICIENCY OF THE EVIDENCE AT PETITIONER'S FIRST TRIAL IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT, AND THIS PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT.

Even a superficial view of the prosecution's case against the petitioner at the first trial reveals evidence so insufficient that to permit such an effort to go to the jury does not comport with basic principles of due process and the standard to protect these principles as enunciated in *Jackson* v. *Virginia*, 443 U.S. 307 (1979).

The requested directed verdict should have been granted because the State's case was Constitutionally deficient. The State's case failed to prove all elements of the offense charged, what proof was presented did

not pass the mandated standard of proof beyond a reasonable doubt, and the proof fails the *Jackson* test of "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Id.* at 315.

With only one "eyewitness" who was biased and vacillating, and whose very ability to observe from two hundred feet away is questionable, and with physical evidence which contradicted the sole witness's version of the incident and corroborated the Petitioner's, the State cannot be said to have met the burden of proving beyond a reasonable doubt each element of murder: certainly not the intent to cause the death of another person; nor, under circumstances manifesting extreme indifference to human life, that he shot wantonly; and neither beyond a reasonable doubt.

In *Jackson*, this Court noted that a jury may convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. *Id.* at 317. Petitioner maintains that under the evidence presented, the courts should have asked whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The trial court did not ask this question; the intermediate Kentucky court stated that directed verdict of acquittal was not warranted unless "it would be unreasonable to find the defendant guilty under any possible theory of criminal homicide," (Pet. App.

15a) and stated, "We cannot say that there was not a reasonable basis for a conviction under a lesser included offense" (*Id.*); and the Supreme Court of Kentucky, relying upon the unreliable prime witness, merely concluded that "a reasonable juror could have believed from the evidence" either the intentional murder or wanton murder of the victim, without referring to any standard as enunciated by this Court (Pet. App. 6a).

As this Court has pointed out, a "mere modicum" of evidence cannot seriously be argued to rationally support a conviction beyond a reasonable doubt. 443 U.S. at 320. This Court has mandated that the Due Process Clause of the Fourteenth Amendment requires sufficient proof of every element of the crime charged beyond a reasonable doubt, and, for this very reason, to have committed the issue of guilt to the jury without such sufficient proof was error from which petitioner was entitled to relief and not the ordeal of a second, better prepared prosecution by the Commonwealth of Kentucky.

Because the proof presented at petitioner's first trial was so lacking in sufficiency that no juror could have reasonably found guilt of murder beyond a reasonable doubt as the Constitution, as explained in *Jackson*, demands, Petitioner prays that this Court grant his Petition for a Writ of Certiorari in order to review the evidence under the proper constitutional standard.

III. THE SECOND TRIAL OF PETITIONER VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY AS CONTAINED IN THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

The Constitution of the United States guarantees that "nor shall any person be subject for the same offense to be twice put in jeopardy in life or limb." U. S. Const. amend. V. This prohibition was held applicable to the states through the Fourteenth Amendment in *Benton* v. *Maryland*, 395 U. S. 784 (1969).

This Court has also held that when there is a finding of insufficient evidence for a conviction, "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster at the first proceeding." *Burks* v. *United States*, 437 U. S. 1 (1978).

Since the Petitioner was constitutionally entitled to a directed verdict of acquittal at the first trial because of the insufficiency of the evidence, his being put in jeopardy a second time was clearly a violation of his constitutional rights. Therefore, Petitioner prays that this Court grant this Petition for Writ of Certiorari so that the Commonwealth of Kentucky will not be allowed to have finally managed to convict him in direct conflict with the facts and rationale of *Burks*.

The case at bar is a prime example of the prosecution's being given another opportunity to supply evidence it failed to muster at the first trial: the very situation condemned in *Burks*. On the face of the evidence, in the words of the Court of Appeals and with a reiteration by the Supreme Court of Kentucky, the Commonwealth was able to muster "a stronger case" at the second trial.

Since 1824, this Court has demanded strict scrutiny of a court's decision to retry an accused. *United States* v. *Perez*, 22 U.S. (9 Wheat) 579 (1824). The courts are to exercise this power "with the greatest caution under urgent circumstances." *Id.* at 579.

"The State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . subjecting him to embarrassment, expense and ordeal, and compelling him to live in a state of anxiety and insecurity," said this Court in *Green* v. *United States*, 355 U.S. 184, 187 (1953). Like Green, the Petitioner "was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge, and the jury refused to convict him." *Id.* at 190.

So, too, has the Petitioner's jury at the first trial refused to convict him. With such deficient evidence, the Double Jeopardy Clause must render the second trial of the Petitioner a violation of his constitutional protections.

The law of *Burks* is clear. The evidence against him being insufficient at the first trial, Petitioner seeks relief from the conviction obtained by the Commonwealth in violation of his rights and in conflict with this Court's decision in *Burks*.

IV. A CRIMINAL DEFENDANT WHOSE FIRST TRIAL ENDED IN A HUNG JURY AND WHO ALLEGES THAT THE EVIDENCE AT TRIAL WAS LEGALLY INSUFFICIENT TO HAVE SUSTAINED HIS CONVICTION SHOULD NOT BE FORCED TO RUN THE GAUNTLET OF A SECOND PROSECUTION, AND THIS RAISES AN IMPORTANT FEDERAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Burks v. *The United States*, 437 U.S. 1 (1978) made it clear that a criminal Defendant can challenge the insufficiency of the evidence presented at his first trial, which ended in a hung jury, when he appeals his conviction at the second trial. It is the second trial itself which becomes impermissible under the Double Jeopardy Clause if the evidence at the first trial is so legally insufficient. But what can the State defendant do to present his claim for appellate consideration without first undergoing the ordeal of the reprosecution?

In Kentucky, the victim of insufficient evidence in a hung jury situation is in a worse position than one convicted. The convicted can appeal the insufficiency and, if it is truly insufficient, never be retried. The Defendant for whom some of the jurors vote "not

guilty" is in a worse posture. Even though the evidence is so insufficient that some of the jury have reasonable doubts and insist upon voting not guilty so that the jury hangs, he must endure a second trial with all of the risks and attendant evils recognized by this Court.

As far back as 1896, it has been clear that "the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' " *United States* v. *Ball*, 163 U.S. 662, 669 (1896). The underlying reasons for the prohibition have been equally clear:

> The underlying idea, one which is deeply engrained in the Anglo-American system of jurisprudence, is that the State with all its resources and powers, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty. *Green* v. *United States*, 355 U.S. 184, 187-88 (1953); See also, *Downum* v. *United States*, 372 U.S. 734 (1973); *Burks* v. *United States*, 437 U.S. 1 (1978).

The case at bar is a prime example of the State's being given another opportunity to supply evidence it failed to muster at the first trial: the very situation condemned in *Burks*. On the face of the evidence

presented by more than double the number of witnesses at the first trial (TR. v.I and v.II. 1-337) and in the words of the Kentucky Court of Appeals, the Commonwealth "presented a stronger case" at the second trial. (Pet. App. 17a). Even the Supreme Court of Kentucky stated that the "evidence at the second trial was stronger than the evidence at the original trial." (Pet. App. 7a).

Only the Court of Appeals of Kentucky addressed the issue of the Petitioner's having no avenue of review at the end of the first trial, resulting in the hung jury. That Court stated only, "Nichols had no appeal following the mistrial. Indeed, we could not tolerate a procedure of permitting appeals from mistrials." (Pet. App. 16a). The Supreme Court of Kentucky did not respond to Petitioner's argument regarding this inequity, nor did it comment upon the lower appellate court's declaration.

It is inconsistent with the above quoted principles of this Court and the rationale in *Abney* v. *United States*, 431 U.S. 651 (1977), that appellate review of a double jeopardy claim under *Burks* would be postponed by the State until after conviction and sentence.

Petitioner thus challenges the authority of the State to force him to stand trial once he has already run the gauntlet and challenges the position of the Court to simply "not tolerate" reviewing his claim prior to ultimate conviction. In another Kentucky case, an accused has undergone three (3) trials, all

ending in mistrials for hung juries and appeal after ultimate conviction has been held sufficient remedy. *Jones* v. *Hogg*, 639 S.W.2d 543 (Ky. 1982). Petitioner asks how long a State may postpone review and at what costs to the accused's right to be free from "embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity. *Green* v. *United States*, 355 U.S. at 187.

For the foregoing reasons and because this Court has recently agreed to review this issue as it applies to interlocutory appeals in *Richardson* v. *United States*, 702 F.2d 1079 (D.C. Cir. 1983), *cert. granted* (U.S. Oct. 11, 1983) (No. 82-2113), Petitioner prays that this Court state the prisoner's protections after mistrial under the Double Jeopardy Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of Kentucky's Appellate Courts in *Nichols* v. *Commonwealth*, No. 82-SC-517-DG (Ky. June 15, 1983) and *Nichols* v. *Commonwealth*, No. 81-CA-1269-MR (Ky. Ct. App. April 2, 1982).

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINIONS BELOW

RENDERED: June 15, 1983
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
NO. 82-SC-517-DG

AUBREY NICHOLS — MOVANT

ON REVIEW FROM THE COURT OF APPEALS
V. NO. 81-CA-1269-MR
(Perry Circuit Court NO. 79-CR-009)

COMMONWEALTH OF KENTUCKY — RESPONDENT

OPINION OF THE COURT BY JUSTICE VANCE

AFFIRMING

Appellant was indicted for murder and his first trial resulted in a hung jury. On his second trial he was found guilty of second degree manslaughter and sentenced to confinement for ten years.

Appellant contends that he was entitled to a directed verdict on his first trial because the evidence was not sufficient to sustain a conviction, and therefore the double jeopardy provisions of the United States and the Kentucky Constitutions prevent his retrial.

A reversal of a judgment of conviction on appeal on the ground that no reasonable trier of fact could have found guilt on the basis of the evidence at trial precludes a retrial of the case because of prior jeopardy. *Burks* v. *United States*, 437 U.S. 1, 98 S. Ct. 2141,

57 L. Ed. 2d 1 (1978); *Commonwealth* v. *Burris*, Ky., 590 S.W.2d 878 (1979).

In some cases the declaration of a mistrial by a presiding judge when there was no manifest necessity to do so will prevent retrial. *United States* v. *Perez*, 22 U.S. (9 Wheat) 579 (1824). *Downum* v. *United States*, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford a more favorable opportunity to convict are examples of when jeopardy attaches. *Gori* v. *United States*, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 901 (1961). The granting of a mistrial because the jury is unable to agree is a classic example of when a retrial can be had, although the jury originally empaneled was discharged without reaching a verdict and without the defendant's consent. *Downum* v. *United States*, *supra*. There is no argument before us that the trial judge abused his discretion by discharging the jury.

Rather, appellant contends that because he was entitled to a directed verdict at the first trial, he cannot be tried again. We have carefully reviewed the evidence at the first trial and hold that appellant was not entitled to a directed verdict of acquittal.

The motion for directed verdict, made at the close of the Commonwealth's case and again at the completion of all of the evidence, could not be sustained unless the evidence was such that a reasonable juror could not find guilt beyond a reasonable doubt under

any theory of the case on the evidence presented. *Trowel* v. *Commonwealth*, Ky., 550 S.W.2d 530 (1977).

Evidence was presented at the original trial of an eyewitness who vacillated at trial but admitted that he testified before the grand jury as follows:

MR. COMBS continues reading: "So they was moving around and scuffling and I seen this gun and I said "Boys, Nick's got a gun over there." Phyllis was in the car with the door locked and the window rolled up.

Q. By Nick, do you mean Aubrey Nichols?

A. Yeah. Everybody calls him Nick. Sonny he just turned around and headed back in and Nick he just brings the gun up and holds it there just like that and shoots it. That's exactly what I saw.

Q. Where was she at?

A. She was in the car, the passenger's side.

Q. Did you hear any words between him or her or anyone else?

A. No, sir.

Q. You was across the street at another place?

A. I was across the parking lot.

Q. Too far to hear any words. You wouldn't have heard him if there were, would you?

A. If they had been talking loud or hollering I would.

Q. How close would you say you was to them?

A. I'd say 200 foot. I don't know.

Q. How many shots was fired?

A. Well, the only shot that I seen was the one he shot at the car at her. I seen fire fly from the gun, and he had it aimed right at the car.

Q. What did you say? You said something about Sonny Spencer standing there with him.

A. Yeah, Sonny, evidently Sonny was trying to get him to not shoot her or something and he probably seen he couldn't stop it so he just turned around and headed back in the building, see.

Q. He headed back in the building?

A. Yeah, and he hadn't hit the door when he shot her.

Q. Do you think Spencer was probably already inside then?

A. He hadn't made it inside.

Q. But he was turned going into the door though?

A. Yeah, well, see, like this is the front of the building and this is the corner of the building. She was shot right in the corner of the building, so he had to come around the corner to go back in the club.

Q. He wouldn't have been in view of the shooting then?

A. No.

Did you say those things to the Grand Jury? Answer those questions?

A. Evidently I did.

MR. BURNS:
Your Honor, please, I move to strike and admonish the jury not to consider it for any purpose whatever.

THE COURT:
Overruled.

MR. BURNS:
I move to set aside the swearing of the jury and continue the case.

THE COURT:
Overruled. Continue.

Q. 27 Did you answer those questions in that manner to this grand jury.

A. Yes.

Q. 28 And you were under oath?

A. Yes.

Q. 29 I'll ask you again. Did you lie to the Perry County Grand Jury?

A. No.

Q. 30 Then is that your testimony? Is that what you saw that night on November 30, 1978?

A. I guess that's it.

Q. 31 Well now is it or isn't it? You started out here, Mr. Napier, telling us you didn't see anything, it was dark, and you have all this against Nick Nichols. Now I want this jury to know is what you told the Grand Jury is it the truth or not the truth?

A. That's what I saw.

Although at trial this witness vacillated greatly in the tug of war between examination and cross-examination, he did state that his testimony before the grand jury was truthful and his credibility was for the jury. There was evidence that the appellant and the deceased were drinking heavily before the incident and that they were quarreling and cursing just before they left the bar and went to the parking lot where this shooting occurred.

A reasonable juror could have believed from the evidence that appellant deliberately fired a pistol into the automobile with intent to kill the deceased or that under circumstances manifesting extreme indifference to human life, he wantonly engaged in conduct which created a grave risk of death to another person and thereby caused the death of another person. K.R.S. 507.020.

On a motion for directed verdict the evidence must be viewed in the light most favorable to the Commonwealth, and viewed from that standpoint the motion was properly overruled. It follows, therefore, that because evidence would have sustained a verdict of guilty had the jury agreed upon such a verdict, the inability of the jury to agree, either as to guilt or innocence, necessitated a mistrial, and a retrial was not precluded by a plea of former jeopardy. *Downum* v. *United States, supra.*

Appellant objected to the instruction on second degree manslaughter on the ground that no evidence

justified such an instruction. He reiterates here that his conviction of second degree manslaughter was unsupported by any evidence of wantonness.

The evidence at the second trial was stronger than the evidence at the original trial. Again, the jury was entitled to believe from the evidence that the appellant fired a pistol into an automobile in which the deceased was sitting. The jury was not required to believe appellant's version of the incident in which he claimed that the pistol accidently discharged while he and the deceased were struggling over it.

The firing of a pistol into an occupied automobile which causes death of the occupant is murder if the jury is convinced that the shooting was done with the intent to cause the death. The firing of a pistol into an occupied car is also a wanton act and if the occupant is killed unintentionally, it is nevertheless murder if the jury is convinced that the person firing the pistol wantonly engaged in conduct which created a grave risk of death under circumstances manifesting extreme indifference to human life. K.R.S. 507.020(2).

A person is guilty of second degree manslaughter when he wantonly causes the death of another person. K.R.S. 507.040. The 1974 commentary to the penal code makes the following distinction between wanton murder and second degree manslaughter:

When KRS 507.040 is read in conjunction with KRS 507.020(1)(b), it is clear that all deaths

resulting from wanton conduct must constitute either murder or manslaughter in the second degree. It is also clear that once the elements of wantonness are shown to exist, the choice between the two offenses depends upon whether or not the defendant's conduct manifested "extreme indifference to human life." As indicated in the commentary to KRS 507.020, this distinguishing standard cannot be cited as an example of linguistic clarity. Yet it is used by most of the modern penal codes and justified as follows:

> Whether [wantonness] is so extreme that it demonstrates similar indifference is not a question that, in our view, can be further clarified; it must be left directly to the trier of the facts. If [wantonness] exists but is not so extreme, the homicide is manslaughter . . . . Model Penal Code, § 201.2, Comment 2 (Tent. Draft No. 9, 1959).

Wanton conduct was defined in the instructions as follows:

> *Wantonly* - a defendant acts wantonly with respect to another's death when he is aware of and consciously disregards a substantial and unjustifiable risk that death will occur. In order to be "substantial and unjustifiable" the risk of death must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. [KRS 501.020(3)].

We cannot say as a matter of law that a reasonable juror could not believe beyond a reasonable doubt from the evidence presented that appellant wantonly caused the death of Phyllis Madden. Likewise, we do not consider the admission of testimony of Ronnie Freels, a ballastics expert, which was objected to by appellant, to be prejudicially erroneous.

The Judgment is affirmed.

ALL CONCUR.

ATTORNEY FOR MOVANT:

William M. Scalf
702 Security Trust Building
Lexington, Kentucky 40507

ATTORNEYS FOR RESPONDENT:

Steven L. Beshear
Attorney General
Carl Miller
Assistant Attorney General
Capital Building
Frankfort, Kentucky 40601

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SUPREME COURT OF KENTUCKY
NO. 82-SC-517-DG

AUBREY NICHOLS — MOVANT

APPEAL FROM PERRY CIRCUIT COURT
V. #79-CR-009
HON. REED D. ANDERSON (SPECIAL JUDGE)

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING PETITION FOR REHEARING

Movant's petition for rehearing is denied.

All concur.

ENTERED November 2, 1983.

/s/ Robert F. Stephens
Chief Justice

* * * * * * *

SUPREME COURT OF KENTUCKY
NO. 82-SC-517-DG

AUBREY NICHOLS — MOVANT

ON APPEAL FROM PERRY CIRCUIT COURT
V. 81-CA-1269-MR
(Perry Circuit Court. No. 79-CR-009)

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER

On the motion of appellant, Aubrey Nichols, a stay of execution and enforcement of this court's opinion of June 15, 1983, which became final on November 2, 1983, is granted for a period of ninety (90) days to and including January 31, 1984, in order that Aubrey Nichols may make application to the Supreme Court of the United States for a Writ of Certiorari. Such stay is conditioned upon appellant's execution of bond to the Commonwealth of Kentucky in an amount to be set and the surety approved by the Perry Circuit Court that the appellant will appear and satisfy the judgment of the court upon termination of this stay. Additional stays should be obtained from the United States Supreme Court.

Wintersheimer, Aker, Gant and Leibson, JJ., sitting. All concur.

ENTERED November 18th, 1983.

/s/ Robert F. Stephens
Chief Justice

* * * * * * *

OPINION RENDERED:
April 2, 1982; 2:00 p.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
81-CA-1269-MR

AUBREY NICHOLS APPELLANT

APPEAL FROM PERRY CIRCUIT COURT
v. HONORABLE REED D. ANDERSON,
SPECIAL JUDGE
ACTION NO. 79-CR-009

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

* * * * * * * * * * * * * * * * *

BEFORE: GUDGEL, HOWERTON, and REYNOLDS, Judges.

HOWERTON, JUDGE. Nichols appeals from a conviction of second-degree manslaughter and a sentence of 10 years. This cases arises out of a shooting incident at the Imperial Club in Vicco, Kentucky, on November 30, 1978, which resulted in the death of Phyllis Madden. Nichols was indicted for murder, and was first tried in November 1979. The jury was unable to reach a verdict, and the trial court declared a mistrial. The case was retried in October 1980. Nichols presents three arguments for reversal.

1. The appellant was entitled to a directed verdict of acquittal at his first trial because of insufficiency of evidence and, therefore, he was shielded from a second trial by the bar against double jeopardy and the appellate court should direct the trial court to enter a directed verdict of acquittal.
2. Where the Commonwealth has failed to meet its burden of establishing the crime charged by proof beyond a reasonable doubt, then the defendant is entitled to a directed verdict of acquittal or in the alternative, to a judgment notwithstanding a verdict of guilty.
3. Where the Commonwealth fails to properly qualify its expert witness, and continuously propounds improper hypothetical questions and receives improper replies thereto, such improper evidence was substantially prejudicial to appellant and requires a new trial.

The Commonwealth presented a very weak case at the first trial. It attempted to prove intentional murder with one reluctant eye witness who vacillated in his testimony. The Commonwealth was permitted to read into the evidence his testimony before the grand jury upon which the indictment had been based. He had stated that he saw Nichols shoot one shot into the air and a second shot into his closed vehicle where the victim was sitting, and then he saw Nichols throw the gun into a creek. The witness recanted and explained that he determined what he thought he saw

after going to the scene and observing the situation. At the time of the shooting, he was located 70-plus yards away at another tavern. Other evidence presented by the Commonwealth indicated that the victim had been shot in the back of the head with the bullet exiting through her forehead. The gun was found in the creek.

Nichols's theory of the case was that the victim's death was accidental. The parties had been drinking heavily and were involved in an argument as they left the tavern. Nichols claims that Ms. Madden had the pistol and shot at him first. He was wrestling with her in an attempt to take the gun away when it discharged and killed her.

The physical evidence did tend to support Nichols's explanation. There was a bullet hole in a vehicle parked with his car on the passenger's side. This could have been from the shot allegedly fired by the victim. No trace of the bullet which killed Ms. Madden was found inside Nichols's car, which contradicts the testimony of the eye witness. Nichols testified that the shooting occurred with the passenger door open. He was located on the outside of it and she was behind it. The passenger window had been shattered by some means, and all or most of the glass had fallen into the vehicle. Nichols testified that the glass fell out when he closed the door.

Nichols moved for a directed verdict of acquittal at the close of the Commonwealth's evidence and

again at the close of all of the evidence. The trial court denied both motions, and in reviewing the totality of the evidence, we must conclude that the trial court was correct.

The motion was made prior to the giving of any instructions, and it in essence alleged that the Commonwealth had not proven criminal homicide under any theory. This could include murder, first and second degree manslaughter, or reckless homicide. A directed verdict of acquittal is not warranted unless, viewing all of the evidence as a whole, it would be unreasonable to find the defendant guilty under any possible theory of criminal homicide. *Campbell v. Commonwealth*, Ky., 564 S.W.2d 528 (1978). Where the evidence is conflicting, the case should be submitted to the jury. *Trowel* v. *Commonwealth*, Ky., 550 S.W.2d 530 (1977). *See also, Baril* v. *Commonwealth*, Ky., 612 S.W.2d 739 (1981). Furthermore, in considering Nichols's motion, the trial court was required to construe the evidence most favorably to the prosecution. *Bailey* v. *Commonwealth*, Ky., 483 S.W.2d 112 (1972).

The trial court instructed only on the offense of murder. Although the evidence of murder was weak and questionable, there was nevertheless sufficient evidence to submit the case to the jury. Certainly we cannot say that there was not a reasonable basis for a conviction under a lesser included offense. Nichols offered no objection to the murder instruction, nor did

he offer any instructions for other offenses. For the significance of this, *see, Queen* v. *Commonwealth*, Ky., 551 S.W.2d 239 (1977), and 8 Fitzgerald, *Kentucky Practice*, § 825 (1978).

Prior to the beginning of the second trial, Nichols moved to dismiss the indictment because of the alleged error of denying him a directed verdict of acquittal at the first trial. It was this motion that preserved the alleged error from the first trial for review following the conviction. Nichols had no appeal following the mistrial. Indeed, we could not tolerate a procedure of permitting appeals from mistrials.

Having decided that the trial court properly denied the motion for a directed verdict of acquittal, we need not decide whether a retrial for the same offense or offenses following a hung jury in a trial wherein there should have been an acquittal places the accused in double jeopardy. As to this question, however, prosecutors, defense attorneys, and trial judges should be aware of KRS 505.030, 8 Fitzgerald, *Kentucky Practice*, § 825 (1978), and such cases as *Commonwealth* v. *Burris*, Ky., 590 S.W.2d 878 (1979), and *Burks* v. *U.S.*, 437 U.S. 1 (1978).

We now turn to the second trial which resulted in the conviction for manslaughter in the second degree. A conviction for the offense required wanton conduct on the part of Nichols. KRS 507.040. Nichols first argues that the Commonwealth failed to meet its burden of proof of guilt beyond a reasonable doubt

and that he was entitled to a directed verdict of acquittal, or in the alternative, a judgment notwithstanding the verdict.

The Commonwealth presented a stronger case against Nichols in the second trial. Instructions were given on murder, and all lesser included offenses of criminal homicide. There was clearly sufficient evidence to allow the case to go to the jury on a theory of recklessness, wantonness, or intentional shooting. Since Mrs. Madden was shot in the back of the head, it would be reasonable for jurors to at least believe that Nichols had taken some control over the pistol. The evidence supports a conclusion that the shooting was other than accidental. What the law requires is that the homicide probably, i.e., more likely than not, occurred as a result of Nichols's wanton conduct. *Timmons* v. *Commonwealth*, Ky., 555 S.W.2d 234 (1977). There is no legal basis for this Court to disturb the jury's decision.

Finally, we find no merit in the argument that Nichols was unreasonably prejudiced by the testimony of Ronnie Freels, a ballastics expert. We fail to find prejudice in his testimony regarding the entrance and exit wounds, because the testimony did not require an expert to explain what the photographs in evidence clearly indicated. Many of Nichols's objections to hypothetical questions were sustained, and a review of the transcript of Freel's testimony indicates a reasonable exercise of discretion by the trial judge in

handling the objections. If we were to acknowledge any error, we could only conclude that it was harmless, and harmless error does not require reversal. RCR 9.24, and *Niemeyer* v. *Commonwealth*, Ky., 533 S.W.2d 218 (1976).

The judgment of the trial court is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT:

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ATTORNEYS FOR APPELLEE:

Steven L. Beshear
Atty. General

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Asst. Atty. General
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Frankfort, KY 40601

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PERRY CIRCUIT COURT
CRIMINAL BRANCH

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

AUBREY NICHOLS DEFENDANT

FINAL JUDGMENT
SENTENCE OF IMPRISONMENT
INDICTMENT NO. 79-CR-009
CHARGES: MANSLAUGHTER 2ND DEGREE
KRS 507.040

* * * * * * * * * *

The defendant having entered a plea of not guilty, and on the 15th day of October, 1981, a jury having returned a verdict that the defendant was guilty of the crime of Manslaughter 2nd Degree and fixed his sentence at Ten (10) years in the state reformatory.

On this the 10th day of March, 1981, the defendant, Aubrey Nichols appeared in open Court with his attorney Hon. William M. Scalf, and the Court inquired of the defendant and his counsel whether they had any legal cause why judgment should not be pronounced, and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration to the written report of the presentence investigation prepared by the Division of Probation and

Parole, and to the nature and circumstances of the crime, and the history, character, and condition of the defendant, the Court is of the opinion that imprisonment is necessary for protection of the public because of the seriousness of the crime.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant, and it is therefore ORDERED and ADJUDGED by the Court that the defendant is guilty of the crime of Manslaughter 2nd Degree and that he shall be confined in the state penitentiary for a maximum term of Ten (10) years at hard labor; and having been advised of his right to appeal,

It is further ORDERED and ADJUDGED that the Perry County Sheriff shall deliver the defendant to the custody of the Department of Corrections hereunder at such location within this state as the department shall designate.

It is further ORDERED and ADJUDGED that the defendant is hereby credited with the time spent in custody prior to the commencement of sentence, namely, seven (7) days, toward service of the maximum term of imprisonment. The defendant is allowed to file a $50,000.00 property bond pending his appeal.

/s/ Reed D. Anderson
SPECIAL JUDGE, PERRY CIRCUIT COURT

ENTERED: March 10, 1981.

Perry County Circuit Court Clerk
By: /s/ SmD.C.

Copies to:
Hon. Beth Myerscough & Wm. Scalf

* * * * * * *

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Const. amend V:

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

2. U.S. Const. amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Ky. Rev. Stat. Ann. 507.020 (Bobbs-Merrill Supp. 1982): Murder:

(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the cir-

cumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense.

4. Ky. Rev. Stat. Ann. §507.040 (Bobbs-Merrill 1975): Manslaughter in the second degree:

(1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person.

(2) Manslaughter in the second degree is a Class C felony.

5. Ky. Rev. Stat. Ann. §501.020(3) (Bobbs-Merrill 1975): Definition of mental states:

* * *

(3) "Wantonly" — A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of

conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

* * * * * * *